AFFIN CREDIT (1991) SDN BHD

v.

DATO' HJ RAUN DJALIL ATMOSUMARTO

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
ABDUL AZIZ MOHAMAD JCA
RAHMAH HUSSAIN JCA
[CIVIL APPEAL NO: W-03-81-1996]
18 DECEMBER 2003

BANKRUPTCY: *Petition - Opposition to petition - Judgment upon which bankruptcy notice founded not set aside - Whether court could determine validity of debt at petition stage*

The appellant commenced a writ action against the respondent and three others in the Kuala Lumpur High Court, claiming a sum of RM1,043,890.32 with costs and interest. The sum claimed was due under a leasing agreement in respect of a computer mainframe. Judgment in default of appearance was entered *inter alia* against the respondent and subsequently executed against him *vide* a writ of seizure and sale. Some belongings of the respondent were seized and auctioned off. The proceeds recovered were off-set against the sum due and owing. Bankruptcy proceedings were then commenced against the respondent for the shortfall. The judgment in default of appearance was never set aside by the respondent. When the bankruptcy petition was presented against the respondent, he opposed the petition on two main grounds. Firstly, he argued that his own belongings were auctioned off at a gross undervalue ('the auction question'). Secondly, he claimed that the appellants had failed to repossess the computer mainframe and sell it at the right time ('the mainframe question'). The senior assistant registrar dismissed the respondent's opposition and made receiving and adjudication orders. The respondent appealed to the judge-in-chambers ('Judicial Commissioner'), who set aside the orders of the senior assistant registrar. In the Court of Appeal, counsel for the appellant submitted that the Judicial Commissioner had erred in law and fact when he failed to consider that the court could not at the stage of the bankruptcy petition go beyond the judgment and enquire into the validity of the debt.

Held (allowing the appeal)

Per Rahmah Hussain & Mokhtar Sidin JJCA delivering the majority judgment of the court:

[1] The court could not at the stage of the bankruptcy petition inquire into the validity of the public auctions as there was no proof that the auctions were not carried out according to the provisions of the law. Furthermore, the respondent who was represented by a solicitor during the execution by way of writ of seizure and sale did not raise this issue at that stage (execution stage). Lastly, there was no application filed by the respondent for an order that the sheriff or bailiff show cause why the goods were sold at a gross undervalue. (p 348 e-f)

[2] The Judicial Commissioner also failed to consider that the respondent had not raised the mainframe question by way of a counterclaim or a cross claim in the original writ action in which the judgment in default was obtained against him. As such he could not raise this issue in the application to set aside as the judgment in default had not been set aside. (p 348 h-i)

[3] The Judicial Commissioner further failed to take into account that any counter-claim, set-off or cross-demand set up by a debtor against a creditor must be in a liquidated sum or a money demand which is ascertainable with certainty as between the parties, and not as in the instant bankruptcy action where the respondent had not given any value to the computer mainframe. (p 349 a)

Per Abdul Aziz Mohamad JCA (dissenting):

[1] It was clear from the affidavits that the conclusion to be drawn must be that the mainframe was all the time with the respondent and that there was no good reason why the appellant did not repossess it. (p 344 d)

[2] There was nothing in the memorandum of appeal that questioned the judge's decision on the mainframe question. Instead, many paragraphs in it questioned the judge's queries in the appeal before him about matters which, however, did not eventually come within his consideration in his judgment. Since the memorandum of appeal did not seek to question the judge's decision on the mainframe question, and since his decision on that question was sufficient for the appeal before him to be dismissed, the decision ought not to be allowed to be questioned on appeal and, therefore, the appeal ought to be dismissed. (p 345 b-f)

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu memulakan satu tindakan writ di Mahkamah Tinggi Kuala Lumpur terhadap responden dan tiga yang lain, menuntut sejumlah RM1,043,890.32 kos dan faedah. Jumlah yang dituntut adalah hutang di bawah satu perjanjian pajakan berkaitan dengan rangkautama komputer. Penghakiman ingkar kehadiran telah dimasukkan antara lain terhadap responden, dan dilaksanakan melalui satu writ sita dan jual. Berikutnya, beberapa barangan responden telah disita dan dilelong dan hasil lelongan ditolak jumlah yang terhutang. Prosiding bankrapsi kemudian dimulakan terhadap responden bagi mendapatkan baki hutang. Responden tidak mengetepikan penghakiman ingkar kehadiran. Bagaimanapun, apabila petisyen bankrapsi dikemukakan, responden membantah petisyen tersebut atas dua alasan. Pertama, bahawa barangan-barangannya telah dijlelong pada harga yang sangat rendah ('persoalan lelong'), dan kedua, bahawa perayu telah gagal mengambil milikan semula rangkautama komputer untuk dijual pada masa yang sesuai ('persoalan rangkautama'). Apapun, penolong kanan pendaftar menolak bantahan responden sekaligus membuat perintah hukuman dan penerimaan. Responden merayu kepada hakim dalam kamar ('Pesuruhjaya Kehakiman') dan berikutnya perintah penolong kanan pendaftar telah diketepikan. Di Mahkamah Rayuan, peguam perayu berhujah bahawa Pesuruhjaya Kehakiman telah silap di sisi undang-undang dan fakta kerana gagal menimbang bahawa mahkamah tidak boleh, di peringkat petisyen bankrapsi, melangkahi penghakiman dan menyiasat kesahan hutang.

Diputuskan (membenarkan rayuan)
Oleh Rahmah Hussain & Mokhtar Sidin HHMR menyampaikan penghakiman majoriti mahkamah:

[1] Mahkamah tidak boleh diperingkat petisyen bankrapsi menyiasat kesahan lelongan awam oleh kerana tiada bukti yang menunjukkan bahawa lelongan tidak dijalankan mengikut peruntukan undang-undang. Lagipun, responden, yang diwakili peguam semasa pelaksanaan writ sita dan jual, tidak membangkitkan isu ini diperingkat tersebut (peringkat pelaksanaan). Akhir sekali, tiada permohonan dibuat oleh responden untuk perintah bahawa Sheriff ataupun Bailif menunjuk sebab mengapa barangan-barangan dijual pada harga yang sangat rendah.

[2] Pesuruhjaya Kehakiman juga gagal menimbang bahawa responden telah tidak membangkitkan persoalan rangkautama melalui tuntutan balas atau tuntutan bersilang dalam writ asal, di mana penghakiman ingkar telah diperolehi terhadapnya. Responden dengan itu tidak boleh membangkitkan isu tersebut dalam permohonan untuk mengetepikan petisyen bankrapsi kerana penghakiman ingkar telah tidak diketepikan.

[3] Pesuruhjaya Kehakiman seterusnya gagal mengambilkira bahawa sebarang tuntutan balas, tolakan atas tuntutan bersilang yang dibuat oleh seseorang penghutang terhadap pemiutang hendaklah dalam bentuk jumlah tertentu atau suatu tuntutan wang yang boleh ditentukan jumlahnya di antara pihak-pihak dan bukannya seperti dalam kes ini di mana responden tidak memberi sebarang nilai kepada rangkautama komputer.

Oleh Abdul Aziz Mohamad HMR (menentang):

[1] Jelas dari afidavit-afidavit bahawa konklusi yang boleh dibuat adalah bahawa rangkautama pada setiap masa berada dengan responden dan bahawa tidak ada alasan kuat mengapa perayu tidak harus mengambilnya kembali.

[2] Tidak ada apa-apa dalam memorandum rayuan yang mempersoalkan keputusan hakim berkaitan persoalan rangkautama. Malahan, banyak perenggan di dalamnya mempersoalkan penyiasatan yang dibuat oleh hakim dalam rayuan di hadapannya, berkaitan perkara-perkara yang akhirnya tidak diliputi oleh pertimbangan-pertimbangan beliau dalam keputusannya. Oleh kerana memorandum rayuan tidak cuba mempersoalkan keputusan hakim mengenai rangkautama, dan oleh kerana keputusan beliau atas persoalan tersebut memadai untuk beliau menolak rayuan di hadapannya, keputusan itu tidak seharusnya dibenar untuk dipersoalkan di rayuan ini. Rayuan di sini dengan itu seharusnya ditolak.

Case(s) referred to:

Perwira Habib Bank Malaysia Bhd v. Samuel Pakianathan Jabamanickam [1993] 3 CLJ 349 SC ***(foll)***

Re Annie Lim [1987] 1 MLJ 276 ***(refd)***

Re Foo Hock Leng ex p Southern Finance Company Bhd; Re Fong Fung Loon ex p NVRM Naderajan Chettiar [1933] 1 MLJ 299 ***(refd)***

Re Hj Yahya Lampang; ex p Sabah Development Bank Bhd [1987] MLJ 488 ***(refd)***

Re Sebastian ex p Metroplex Leasing & Credit Corp Sdn Bhd [1990] 3 MLJ 248 ***(refd)***

Tractors Malaysia Bhd v. Charles Au Yong [1982] CLJ 152; [1982] CLJ (Rep) 355 FC ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, ss. 92(1), 105(1), (5)

Rules of the Court of Appeal 1994, rr. 7(4), (5), 18(1), (2)

For the apellant - Mabel Ann James; M/s Hamzah Abu Samah & Partners
For the respondent - O Thaiyub Khan; M/s Thaiyub Khan Othman & Co

[Appeal from High Court, Kuala Lumpur; Bankruptcy No: D5-29-2645-1993]

Reported by Andrew Christopher Simon

JUDGMENT

Abdul Aziz Mohamad JCA (dissenting):

The learned senior assistant registrar had dismissed the respondent's notice of intention to oppose the appellants' bankruptcy petition and had made receiving and adjudication orders against the respondent. On the respondent's appeal to the judge in chambers, the learned judge (then a judicial commissioner by appointment), allowing the appeal, set aside the receiving and adjudication orders. The appellants appealed to this court.

The appellants had, after 30 September 1999, that is after filing their notice of appeal, effected a change of their name from Affin Credit (1991) Sdn Bhd to Boustead Credit Sdn Bhd, and on the date of hearing of their appeal, 21 January 2003, we allowed their application to change their name in the appeal.

The bankruptcy proceedings against the respondent were a sequel to a writ action brought by the appellants against four parties: Prayitno (M) Sdn Bhd, the respondent, another individual, and Arief Holdings Sdn Bhd. The claim of the appellants in the action was for a sum due under a leasing agreement dated 23 September 1983 and a variation leasing agreement dated 23 May 1984 between the appellants, as owner of the goods leased, and Prayitno (M) Sdn Bhd as the hirer. The goods leased were a computer mainframe. The other three parties, which included the respondent, were sued as guarantors. According to the statement of claim, by the variation the total rental was RM978,923.01, which was to be paid monthly in such and such an amount per month until 23 July 1988, with interest at 16% per annum on any overdue rental. The statement of claim did not set out any other terms of the two agreements, such as terms concerning repossession of the goods upon default. According to the statement of claim, a demand was made for RM996,731.11 as the amount due as at 29 April 1984, to which there had been no response. The amount claimed in the statement of claim, dated 8 December 1987, was RM1,043,890.32 as the amount due as at 30 November 1987. The statement of claim did not state how the goods stood in view of the amount claimed.

On 9 September 1988 judgment in default of appearance was entered against the respondent and the other individual guarantor for the sum of RM1,043,890.32, interest thereon at 16% per annum from 1 December 1998 and costs of RM225.

Pursuant to a writ of seizure and sale, the respondent's own belongings were seized and auctioned to partly satisfy the judgment. They were sold for RM25,085, but after deducting such things as court commission and expenses relating to the auction, there remained RM16,083.37 as the net sale proceeds.

Subsequently on 30 July 1993, based on the judgment, a bankruptcy notice was issued against the respondent. The amount demanded was RM1,973,424.78 and consisted of the judgment sum of RM1,043,890.32, interest on it from 1 December 1987 to 30 July 1993 and costs of RM225, less the net proceeds of sale of the respondent's goods of RM16,083.37. The demand not being satisfied or countered, the respondent committed an act of bankruptcy, on the basis of which the appellants filed their bankruptcy petition against the respondent.

The respondent stated his grounds for opposing the petition in an affidavit which he filed together with his notice of intention to oppose the petition. For the two main grounds, the respondent claimed respectively that the sale of his own goods had been at a gross undervalue ("the auction question") and that the appellants had failed to repossess the mainframe and sell it at the right time ("the mainframe question"). The two grounds did not find favour with the senior assistant registrar, who dismissed the respondent's opposition and made receiving and adjudication orders. The judge, on appeal to him, found in favour of the respondent on both grounds and set aside the orders. He gave his reasons as regards the auction question in a third of a page. He said that the appellants had not adequately replied to the respondent's allegation that his goods had been sold at a gross undervalue. He then gave his reasons as regards the mainframe question in a page and a half, beginning that part of his judgment by saying "Even if I am wrong in this", that is in his finding on the auction question. Reading the judgment, I had the feeling that in allowing the appeal, the consideration that weighed heavily on the judge's mind was the mainframe question rather than the auction question. And as for me, I do not propose to deal here with the auction question because it was on the mainframe question that I was of the view that the appellants' appeal should be dismissed.

In paras. 8, 9 and 10 of his first affidavit, dated 22 June 1995, the respondent averred that the mainframe was still in his possession and that the appellants had been negligent in failing to repossess and sell it at the right time, when it could still have fetched a high price, because if the appellants had done so before the time when they commenced their action against the hirer and the guarantors, the proceeds of sale would certainly have settled the debt claimed in the action; therefore the respondent had a set-off against the appellant petitioner. The respondent was obviously thinking of a leasing agreement which has a mechanism for repossession of the goods upon default and for taking

into account the value of the goods before the amount claimed against the hirer is arrived at. Whether the leasing agreement in this case was such an agreement it is not possible to say because there were no averments as to that and the agreement did not form part of, and was not exhibited in, the proceedings, and I think that that was because the reply that the appellants gave did not go to the terms of the leasing agreement, although it impliedly admitted that repossession was available.

The appellants' reply was given in para. 8 of their affidavit dated 18 March 1996, and the reply was simply to deny paras. 8, 9 and 10 of the respondent's affidavit and to aver that they could not repossess the computer mainframe because the respondent had sold it to the Immigration Department. In support of their averment, they exhibited a letter dated 17 April 1989 from Arief Holdings Sdn Bhd, one of the guarantors, to the appellants, signed by the respondent as managing director. The subject heading of the letter set out five leasing agreements, of which the leasing agreement in this case was one. Against the number of that leasing agreement, L/84/100055/DDO, was specified the sum of RM1,044,115.22. The letter referred to a discussion two days earlier between the representatives of the two companies and went on to say "it is agreed that we append below the following proposals". There were two "proposals". The Immigration Department was mentioned only in the first, which I quote:

> Immediate progress payments to PHB Credit Bhd. on receipt of monthly payments due from Jabatan Imigresen Malaysia (JIM). Todate, we have not received a single payment for more than two years but negotiation is still in progress and will resolve soon.
>
> We enclose a copy of the JIM Contract and other documents for your reference.

PHB Credit Bhd was the name then of the appellants. That "proposal" indicated that payments were due from the Immigration Department to Arief Holdings Sdn Bhd and that there was a contract with the Immigration Department, which was not in the appeal record. The letter by itself was incapable of inspiring in the mind of a stranger the understanding that the respondent had sold the computer mainframe to the Immigration Department.

The respondent said as much in response in para. 8 of his affidavit dated 22 May 1996. He said that the letter did not in any way show that he had sold the mainframe to the Immigration Department. He added that the figure RM1,044,115.22 in the title to the letter was the price at which the mainframe was valued. In paras. 5, 7 and 9 the respondent repeated his earlier averments that the appellants failed to repossess the mainframe and sell it at the right time when its value was still high, that the mainframe was at all times in his

possession, and that if it had been sold at the right time the proceeds would have settled the debt. Thus far the respondent's complaint was as to the appellants' failure before instituting their action. But in para. 6 the respondent added the complaint that the appellants failed to explain why they did not repossess the mainframe to settle the judgment, which was a complaint as to the appellants' failure after the judgment.

The appellants did not respond to that affidavit. The respondent followed it up with another affidavit dated 13 August 1996. In para. 7 he repeated that the mainframe had been in his possession all the time. In para. 9 he denied that he had sold the mainframe to the Immigration Department, adding that he had no right to do so because the appellants were the owners of the mainframe. The appellants again did not respond.

It was clear to me that in the affidavits the fight was as to the appellants' failure to repossess the mainframe and sell it, and the reason for the failure. It was also clear to me that, as the affidavits stood, the conclusion to be drawn must be that the mainframe was all the time with the respondent and that there was no good reason why the appellants did not repossess it. From the notes of the proceedings before the judge, it would appear that the fight in the appeal before him was the fight in the affidavits, with no question of law being raised. It may be assumed that such also had been the confines of the fight before the senior assistant registrar.

The judge decided the appeal as the fight was fought. He accepted that the value of the mainframe was RM1,044,152.32, that it was still with the respondent, that the appellants had failed to repossess it, and that the respondent had no right to sell it to mitigate his losses. Those findings were justified by the state of the affidavits. He concluded as follows:

> It is obvious that the judgment debtor had been short-changed. If the judgment creditor had acted with alacrity and had repossessed the computer mainframe when the judgment debtor defaulted in the payments there is a doubt as to whether any monies would still be due from the judgment debtor. In fact even to-date the said computer mainframe has not been repossessed and nor can the judgment debtor himself dispose of it. I am more than satisfied that this appeal ought to be allowed with costs and I do so accordingly.

It was only in their submission before us that the appellants raised points of law to disqualify the respondent from raising the appellants' failure to repossess and sell the mainframe to oppose the petition. The main point was set out in para. 25 of their skeletal submission:

The Learned Judge in His Lordship's Judgement has erred in law and fact when His Lordship failed to consider that the Court cannot at this stage go beyond the Judgement and inquire into the validity of the debt and in doing so tantamount to a collateral attack upon the final Judgment of a Court of competent jurisdiction and until the Judgement in the original Suit is set aside, the Bankruptcy Notice in this case which conforms to the terms of the Judgement remains valid.

To make matters worse, there was nothing in the memorandum of appeal that questioned the judge's decision on the mainframe question. Instead many paragraphs in it questioned about the judge's queries in the appeal before him about matters which, however, did not eventually come within his consideration in his judgment.

Subrules (1) and (2) of r. 18 of the Rules of the Court of Appeal 1994 provide as follows:

(1) The appellant shall prepare a memorandum of appeal setting forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, and specifying the points of law or fact which are alleged to have been wrongly decided; such grounds to be numbered consecutively,

(2) The appellant shall not without the leave of the Court put forward any other ground of objection, but the Court in deciding the appeal shall not be confined to the grounds set forth by the appellant.

Since the memorandum of appeal did not seek to question the judge's decision on the mainframe question, and since his decision on that question was sufficient for the appeal before him to be dismissed, I was of the view that the decision ought not to be allowed to be questioned on appeal and that, therefore, the appeal ought to be dismissed. Subrule (2) gives discretion to the court to give leave for a ground of objection to be put forward in an appeal even if it has not been set forth in the memorandum of appeal. But in this case the inadequate manner in which the appellants responded to the respondent's averments as to fact could not but lead to the conclusion that the respondent had probably been, as the judge found, "short-changed", and I found it disturbing that finding himself in such a situation the respondent should be made a bankrupt. This, to my mind, would have been a proper case in which not to exercise the discretion to give leave under sub-r. (2) even if leave had been sought.

I ought to mention that the appellants' counsel argued that the ground was set forth in para. 3(b) of the memorandum of appeal. That clearly was not so. Paragraph 3(b) said:

> The Appellant has a clear case against the Respondent as the Respondent had never denied owing the Judgment sum and grave injustice would be done to the Appellant if this Appeal is not allowed with costs.

The appellants' counsel also relied on sub-rr. (4) and (5) of r. 7 of the said Rules, but those provisions clearly have no bearing on the question of failure to set forth a ground in the memorandum of appeal. They say:

> (4) The Court may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.
>
> (5) The powers aforesaid may be exercised notwithstanding that the notice of appeal relates only to part of the decision, and such powers may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties have not appealed from or complained of the decision.

Rahmah Hussain JCA (majority):

Being dissatisfied with the decision of the High Court at Kuala Lumpur, given on 7 October 1996, the appellant filed an appeal to this court. We heard the appeal on 21 January 2003, where, (by a majority decision) we allowed the appeal and affirmed the decision of the learned senior assistant registrar. On the same date, we also allowed the appellant's application to change its name in the appeal, from Affin Credit (1991) Sdn. Bhd. to Boustead Credit Sdn. Bhd.

The appellant commenced a writ action (D1-23-3911-97) against Prayinto (M) Sdn. Bhd., the respondent in this case, Siti Mariam Pilus and Arief Holdings Sdn. Bhd. in the Kuala Lumpur High Court, claiming a sum of RM1,043,890.32 costs and interest. The sum claimed was due under a leasing agreement dated 23 September 1983 and a variation leasing dated 23 May 1984 between the appellant as owner of the goods leased and Prayinto (M) Sdn. Bhd. as the hirer. The goods leased were a computer frame.

On 9 September 1988, a judgment in default of appearance was entered against the respondent and the third defendant (in Sivil suit No. D1-23-3911-97) for the sum of RM1,043,890.32 with interest thereon at the rate of 16% per annum from 1 December 1987 till date of realization and costs of RM225.

The appellant executed the judgment against the respondent *vide* writ of seizure and sale order obtained on 9 July 1991. Several public auctions were carried out, that is on 20 August 1991; 21 October 1991; 18 November 1991; 23 December 1991 & 11 January 1992. Finally the appellant recovered RM25,932.87 from the proceeds of the execution. After some deductions were made from the said proceeds, a balance of RM16,083.37 was credited into the borrowers' account. As there was a deficiency for the sum of RM 1,973,424.78 calculated as at 30 July 1993, bankruptcy proceedings were initiated against the respondent. Adjudication and receiving orders were granted by the learned senior assistant registrar on 6 September 1996. The respondent appealed to the judge in chambers, who reversed the order of the senior assistant registrar, on 7 October 1996.

Before us, learned counsel for the appellant submitted that the learned Judicial Commissioner (as he then was) had erred in law and fact when he failed to consider that the court cannot at this stage go beyond the judgment and enquire into the validity of the debt as in doing so, would be tantamount to a collateral attack upon the final judgment of a court of competent jurisdiction and that until the judgment in the original suit is set aside, the bankruptcy notice in this case which conforms to the terms of the judgment, remains valid. In support, she then referred to several authorities namely *Tractors Malaysia Bhd. v. Charles Au Yong* [1982] CLJ 152; [1982] CLJ (Rep) 355; *Re Annie Lim* [1987] 1 MLJ 276; *Re Haji Yahya Lampang, ex p Sabah Development Bank Bhd*. [1987] MLJ 488; *Re Foo Hock Leng @ Foo Lew, ex p: Southern Finance Company Berhad; Re Fong Fung Loon, ex p: NVRM Naderajan Chettiar* [1933] 1 MLJ 299.

Learned counsel for the respondent conceded that the respondent had not set aside the default judgment but said that *Re Sebastian*, is the authority to say that the judgment can be challenged at the bankruptcy petition stage.

In *Re Sebastian ex p Metroplex Leasing & Credit Corp. Sdn. Bhd.* [1990] 3 MLJ 248, an undischarged bankrupt applied to the court for an order rescinding and annulling, respectively the receiving and adjudicating orders made in the proceedings. The act of bankruptcy relied upon by the petitioning creditor was the non-compliance with a bankruptcy notice founded on a judgment in default against the bankrupt. The bankrupt's application for an order to set aside the judgment had been dismissed following which the bankruptcy proceedings were commenced. Following the making of the receiving and adjudicating orders, the bankrupt applied for leave to appeal out of time against the order dismissing his application for the setting aside of the default judgment. That application too was dismissed. The bankrupt then applied to the court for the order for rescission and annulment, invoking ss. 92(1), 105(1) and 105(5) of the

Bankruptcy Act 1967 and the inherent jurisdiction of the court. The bankrupt sought review of the orders made on the ground that the judgment on which the act of bankruptcy was founded was judgment which had no valid or legal consideration and that in any event it was for an amount significantly in excess of what the plaintiff was entitled to sign judgment for and as such, particularly as it was a default judgment, was irregular and bad.

Thus from the facts of that case, it is clear that there was an application to set aside the default judgment which was dismissed. But in the present case, there is no such application by the respondent. Hence, we are of the view that the said case is not an authority to support the respondent's contention.

We also regret that we are unable to agree with the learned Judicial Commissioner's finding that the Judgment Debtor's goods were sold at a gross undervalue. This is what the learned Judicial Commissioner (as he then was) had to say: (p. 25 – Record of Appeal – 2nd paragraph, lines 6 to 10).

> Since there were no bidders the judgment creditor averred that it purchased 30 new computers for RM2,010.00. This Court is unable to accept this valuation. Surely 30 new computers would have fetched much more than the paltry sum of RM2,010.00.

With the greatest of respect, we are of the view that the court cannot at this stage, inquire into the validity of the public auctions as there was no proof that the auctions were not carried out according to the provisions of the law. Furthermore, the respondent who was represented by a solicitor during the execution by way of writ of seizure and sale, did not raise this issue at that stage. Lastly there was no application filed by the respondent, for an order that the Sheriff or Bailiff show cause why the goods were sold at a gross under value.

On the issue of the computer mainframe, the learned Judicial Commissioner had this to say: (p. 25 – Record of Appeal – 2nd paragraph, lines 11 to 17).

> I find clear evidence from Exhibit AA-22 that the value of the mainframe was RM1,044,155.32. This letter was exhibited by the judgment creditor in support of its case. It must therefore be deemed to accept its contents as correct. In the circumstances, it must accept the value of the computer mainframe as RM1,044,155.32.

Again, with the greatest of respect, we are of the view that the learned Judicial Commissioner has failed to consider that the respondent has not raised this issue by way of a counterclaim or a cross claim in the original proceedings in civil suit No. D1-23-3911-87, in which the Judgment in default was obtained against him. As such he cannot raise this issue in this application to set aside the bankruptcy notice as the judgment in default has not been set aside.

Furthermore, the learned Judicial Commissioner has failed to take into account that any counter-claim, set off or cross demand set up by a debtor against the creditor must be in a liquidated sum or a money demand which is ascertainable with certainty as between the parties and not as in this bankruptcy action, where the respondent has not given any value to the computer mainframe. Instead the learned Judicial Commissioner took upon himself to value the goods, based on a letter (exh. AA22) and not on a proper valuation report.

The Supreme Court in *Perwira Habib Bank Malaysia Berhad v. Samuel Pakianathan a/l Jabamanickam* [1993] 3 CLJ 349 held as follows:

1. (a) Before a judgment debtor can raise the existence of a counter-claim as a defence to a judgment creditor's petition, he (the debtor) must prove by affidavit that the counter-claim must be capable of being quantified in terms of money, and such quantification must be made in the affidavit. Here, the respondent had not quantified his claim in terms of money.

   (b) Neither did the respondent mention in his affidavit the probability of success of the counterclaim.

   (c) The respondent had also not proven that the counter-claim could not have been set up when the summary judgment was obtained, within the meaning of s. 3(1) of the Act.

   (d) Section 3(1)(i) of the Act should not have been extended to cover all pending counterclaims irrespective of whether they could or could not have been filed at the hearing in which summary judgment was obtained.

   (e) Therefore the respondent had not proved, as required by s. 3(1)(i), that he had a counter-claim which equalled or exceeded the appellant's claim.

Thus, based on the abovesaid decision of the Supreme Court, which is binding on this court and the reasons given by us earlier, we allowed this appeal with costs. We also ordered that the deposit be refunded to the appellant.